* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **WRIT PETITION (CIVIL) NO. 6205 OF 2010**

Reserved on : 13th September, 2011

% **Date of Decision: 26th September, 2011**

DALMIA PVT. LTD. ....Petitioner
Through Mr. R.M. Mehta, Advocate.

VERSUS

COMMISSIONER OF INCOME TAX DELHI 10 AND ANR. ....Respondents
Through Mr. Sanjeev Sabharwal, Sr. Standing Counsel.

CORAM:
HON'BLE MR. JUSTICE DIPAK MISRA, THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not ? Yes
3. Whether the judgment should be reported in the Digest ? Yes

SANJIV KHANNA, J.:

The petitioner is a company and for the assessment year 2003-2004 had filed its return of income tax declaring loss of Rs.29,68,536/-. The case was taken up for scrutiny and vide assessment order dated 27th March, 2006, the total income of the petitioner was assessed at a positive figure of Rs.2,19,80,970/-.

2. In the balance sheet enclosed with the original return, t petitioner had shown sundry creditors at Rs. 1,66,37,402/-. The Assessing Officer made an addition of Rs. 19,86,551/- under Section 41(1) of the Income Tax Act, 1961 (for short, 'the Act') in respect of the seven parties, who had not filed confirmations out of the said sundry creditors. The relevant portion of the original assessment order is as under:-

> "1. **Sundry Creditors :**
> *'Sundry Creditors'* have been show at Rs.1,66,37,402/-. Vide this office letter dated 14th October, 2005, the assessee company was asked to furnish complete details/confirmations with respect to the '*Sundry Creditors'*. Such details were submitted by the assessee company vide letter dated 10/2/06. However, confirmations were submitted with respect to only the following parties vide letter dated 03/03/06.

a) WGF Financial Services Ltd.	Rs. 9,04,753/-
b) Comosum Investment Ltd	Rs. 9,05,250/-
c) Jalco Plasto Chem Industries Ltd	Rs,33,18,000/-
d) Jalco Financial Services P Ltd	Rs,28,22,000/-
e) Swastic Commerical P Ltd	Rs. 9,78,660/-
f) Trishul Commercial P Ltd	Rs. 5,45,632/-
g) Mansarovar Commercial P Ltd	Rs. 8,66,669/-
h) Carissa Investment P.Ltd.	Rs.10,12,380/-

But in respect of the following major parties, no confirmations were filed.

a) Corporate Flyers P. Ltd	Rs. 6,17,171/- (addition during the year Rs.72,171)
b) Govan Advertising	Rs.12,49,191/-
c) Moderate Inv. & Commercial Enter	Rs. 1,85,976/- (addition during the year Rs. 80,976)
d) Hindustan Commerical Co Ltd	Rs. 2,05,236/- (addition during the year Rs.92236)

e) Excellent Commercial Co Ltd	Rs. 4,50,976/- (addition during the year Rs.225976)
f) Clayton Commercial Co. Ltd.	Rs. 1,52,080/- (addition during the year Rs.80976)
g) I Lac Investment P. Ltd.	Rs. 1,85,025/-
Total (w.r.t. additions during the year in Case of a,c,d,e,f and rest total amounts)	Rs. 19,86,551/-

> Despite several opportunities provided to the assessee company, it did not file details with respect to these persons nor explained as to what services were provided for which the said expenses are payable by them. Also, it failed to explain the nexus/relationship of these expense with its business activities. It also failed to file the details like since when the said amounts are outstanding nor submitted any confirmations from them. In the absences of any details on this account, the genuineness of these credits is doubtful. This goes to show whether they exist as on date or not. Even in cases of old creditors, it is the assessee who will have to prove whether such creditors have taken any legal action against the assessee for recovery and assessee is in capacity to pay but still not discharged the creditors. Therefore, provisions of section 41(1) of the Act are attracted. Thus, it is held that above liabilities totaling to Rs.19,86,551/- have ceased to exist and therefore, provisions of section 41(1) of the Are attracted. Thus, it is held that above liabilities totaling to Rs.19,86,551/- have ceased to exist and the same are disallowed u/s 41(1) of the Act. Penalty proceedings u/s 271(1)(c) are initiated for concealing the particulars the particulars of income and furnishing inaccurate particulars as discussed. (DISALLOWANCE: 19,86,551/-)."

3. For the reasons recorded below, the Assessing Officer issu notice under Section 147/148 of the Act, dated 4th September, 2009 ;-

> "The assessment of the company M/s Dalmia (Bros) Pvt Ltd for the A.Y. 2003-04 was completed on 27.03.2006 at 2,19,80,970/- vide order dated 27.03.2006 u/s 143(3) of the IT Act. It has been gathered that the assessee company having creditors amount of Rs.166.33 lakh against loss/expenditure/trading liability incurred by the assessee company in previous years. These amounts has been obtained by the assessee company during the year by way of remission or cessation and therefore this amount being deemed income of the assessee company should have been disclosed by the assessee company in which the company failed. The Assessee failed to discharge his duties by not adding back the same into his computation of income as per the IT Act.
>
> Thus the income chargeable to tax has escaped assessment and to reassess such income chargeable to tax which has come to notice now and was of the failure on the part of the assessee by not adding back the same into the computation of income along with return filed by him and the assessee company fails to disclose fully and truly the above said material facts necessary for the assessment.
>
> I have therefore, reason to believe that the income chargeable to tax has escaped for the A.Y. 2003-04."

4. The petitioner filed objections to the reopening of the assessment and called upon the Assessing Officer to dispose of the said objections in terms of the decision of the Supreme Court in ***GKN Driveshafts (India) Ltd. Vs. ITO*** *(2003) 259 ITR 19*. Mainly, two

objections were raised. Firstly, it is a case of change of opinion as was alleged that the predecessor Assessing Officer had taken a conscious and deliberate decision to add an amount of Rs.19,86,551/- from the aforesaid amount of Rs. 1,66,37,402/- and had accepted the remaining amount. Reliance was placed on ***CIT vs. Kelvinator India Ltd.*** *(2010) 320 ITR 561 (SC)*, wherein the Full Bench decision of the Delhi High Court was affirmed, ***CIT Vs. Foramer Fracne*** *(2003) 264 ITR 566 (SC)* and some other cases. The second objection raised was that reopening was made after four years and, therefore, proviso to Section 147 applied. It was stated that there was no failure on the part of the petitioner-assessee to fully and truly disclose the all material particulars as full details were furnished during the course of the original assessment proceedings.

5. As both grounds have been strenuously pressed before us, it may be relevant to reproduce the objections as were raised:-

> A. "Change of opinion and double taxation.
> i)That the assessment proceedings in this case were framed vide an order dated 27.3.2006, under Section 143(3) of the Act. During the said proceedings, your learned predecessor raised specific queries regarding the aforesaid balances amounting to Rs.166.37 lakhs, in the Sundry Creditors A/c and the requisite information was duly furnished by the Assessee. In fact, pages 2 and 3 of the

Assessment order dated 27.3.2006 deals specifically and in great detail with this very amount of Rs.166.37 lakhs.

ii) That your predecessor took a conscious and deliberate decision to add an amount of Rs.19,86,551/- only from out of aforesaid amount of Rs.166.37 lakhs and accepted the remaining amount.

iii) Firstly, the amount of 19,86,551/-, added earlier forms part of the aforesaid sum of Rs.166.37 lakhs [which issue is pending in appeal before the CIT(A)]. The reopening proceedings are thus an attempt at double taxation and betray non application of mind.

iv) Second and more importantly, the notice under Section 148 of the Act (dated 4.9.2009) is based on a mere change of opinion on the same set of facts, without any failure on the part of the Assessee in disclosing full facts at the stage of the original assessment proceedings. The notice under Section 148 of the Act is thus void ab-initio and wholly without jurisdiction and is liable to be withdrawn. The Assessee places reliance on the following judgments; inter alia; in support of its submissions:-

a. CIT v. Kelvinator India Ltd. 320 ITR 561(SC) affirming the full bench judgment of the jurisdictional High Court in the same case reported in 256 ITR 1 as also the judgment of the same Court in CIT v. Eicher Ltd, 294 ITR 310(Delhi).

b. CIT v. Foramer France 264 ITR 566(SC) affirming the judgment of the Allahabad High Court in the same case reported in (2001) 119 Taxman 61(All.)

c. Idea Cellular v. DCIT 301 ITR 407 (Bombay)

d. Hynoup Food and Oil Industries Ltd. V. ACIT 307 ITR 115(Guj.)

B. Reopening after 4 years from the end of the relevant assessment year-proviso to Section 147 of the Act;
i)The notice dated 4.9.2009, seeking to reopen the proceedings for the assessment year 2003-2004, has been issued after the expiry of a period of four years from the end of the relevant assessment year, as the said 4 years expired on 31.3.2008.
ii) The proviso to Section 147 expressly stipulates that no notice reopening the assessment proceedings shall be issued after the expiry of a period of four years from the end of the relevant assessment year, unless there is failure on the part of the assessee to fully and truly disclose all material particulars.
iii) In the present case, the details of the sum of Rs.166.37 lakhs was duly disclosed in the return of income and auditied books of accounts and the information sought by the A.O. was furnished in the course of the assessment proceedings u/s 143(3) of the Act.
iv) That while the reasons contain a bare, empty recital of an alleged failure on the part of the Assessee to disclose material particulars, the same is contrary to the records of the case. The said recital appears to have been included in an attempt to overcome the proviso to Section 147 of the Act and is contrary to the very letter and spirit of the proviso. It further shows that the notice u/s148 of the Act as also the reasons recorded in support thereof suffer from non application of mind and are patently perverse."

6. The Assessing Officer considered the objections and vide detailed speaking order dated 27th August, 2010, rejected the objections raised by the petitioner herein. In the order dated 27th August, 2010, the Assessing officer has stated as follows:-

> "1....................Further the notice issued on the basis of unconfirmed creditors of Rs.32,97,507/=. The details of the same is as under:-
>
> | | |
> |---|---|
> | Total Creditors | 1,66,37,402/= |
> | Confirmation submitted | 1,13,53,244/= |
> | Remaining amount | 52,84,058/= |
> | Addition out of above | 9,86,551/= |
> | Neither details provided nor added | 32,97,507/= |
>
> The above amount of Rs.32,97,507/= remains unconfirmed for which neither the AO asked any details nor any details were provided by you. This amount is not a subject matter of appeal before CIT (A). In view of the above discussion the notice u/s 148 issued is correct and within in four corners of the law.
>
> 2. Once it is established that there is such failure the question about a review or change of opinion would not arise at all. The case laws relied upon in your letter details with a situation where inspite of full and true disclosure of all material facts the reassessment proceedings were held to be a case of change in opinion by various courts. However there case laws do not have applicability to the facts of the present case since here there is a gross and wilful omission on your part in making full and true disclosure of material facts as discussed above. The failure on your part has resulted in escapement of income to the tune discussed in above said para.

3x x x x xx

4. If the Assessing Officer has cause or justification to know or suppose that income has escaped assessment, it can be said to have "reasons to believe" that an income has escaped assessment. The said expression cannot be read to mean that that the Assessing Officer should have finally ascertained the fact by legal evidence or inclusion. The function of the Assessing Officer is to administer the statue with solicitude for the public exchequer with an in-built idea of fairness to taxpayer (CIT V Rajesh Jhaveri Stock Brokers (P) Ltd. (2007) 161 Taxman 316 (SC).

In determining whether commencement of reassessment proceedings is valid, the court has only to see whether there is prima facie some material on the basis of which the department opened the case. The sufficiency or correctness of the material is not a thing to be considered at this stage as held by Supreme Court in the case of ***Raymond Woolen Mills Ltd. V ITO (1999) 236 ITR 34 (SC), Green Arts (P) Ltd. V ITO (2005) 257 ITR 639 (Delhi).*** The assessee cannot challange sufficiency of belief-***ITO V. Lakhmani Mewal Das (1976) 103 ITR 437 (SC).***

5. It has been held by various courts that it is the duty of the assessee to disclose primary fact fully and truly. Reliance in this regard is placed upon following:-

(a) **Zohar Lokhandwala Vs. M G Kamat (1994) 210 ITR 956** " Assessee primary must disclose particular ortions of documents which are material."

(f) Parashuram Pottery Works Co. Ltd. Vs. ITO (1977) 106 ITR 1 (SC)

(g) Indian Oil Corp Vs ITO (1986) 159 ITR 956 (SC)

(h) Calcutta Discount Co. Ltd. Vs ITO (1961) 41 ITR 191 (SC)
(i) ITO Vs. Lakhmani Mewal Das (1976) 103 ITR 437 (SC).

In above quoted cases mainly it was held that the Assessee must disclose all primary facts fully and truly. The words "omission or failure to disclose fully and truly all material facts necessary for his assessment for the year postulate a duty on every assessee to disclose fully and truly all material facts necessary for his assessment . What facts are material and necessary fully and truly all material facts necessary for his assessment. What facts are material and necessary for assessment will differ from case to case. In every assessment proceeding, the assessing authority will, for the purpose of computing or determining the proper tax due from an assessee, require to know all the disclosure by the assessee, or discovered by the ITO on the basis of the facts disclosed, or otherwise the assessing authority has to draw inference as regards certain other facts; and ultimately from the primary facts and the further facts taxing enactment, the proper tax leviable. There can be no doubt that the duty of disclosing all the primary facts relevant to the decision on the question before the assessing authority lies on the assessee.

In the case of Revathy C.P. Equipemnts Ltd. Vs. Dy. CIT (1999) 156 CTR (MAD) 611 it was held that Notice u/s 148 issued after expiry of four years from the end of relevant years did not suffer from any infirmity being based on information contained in the assessment order of a subsequent year. The Assessee can not take shelter under plead that the return did not required a particular fact to be setout and therefore failure to disclose facts would provide

> immunity to assessee from any notice being issue u/s 148 after a period of four years.
>
> Further in the case of Asstt CIT Vs. Sarvamangdala Properties (2002) 257 ITR 722 (Cal) it was held that the duty of disclosing primary facts relevant to the decision of the question before the assessing authority lies on the assessee and it is not for the assessee to tell the assessing authority what inference, whether of facts or law should be drawn.
>
> In view of the above facts, the objection raised by you is no force and it may treated as dispose off the objection raised by you in the letter referred above. Your are therefore, requested to provide the details of creditors as discussed in para 1 of this letter. Kindly noted that since the case has to be disposed off at the earlies therefore, you are requested to comply properly by 03.09.2010 otherwise the inference will be draw that you have nothing to say and the case will be decided on merits."

7. The two contentions, change of opinion and that the petitioner had made full and true disclosure are raised before us. Reliance is placed on ***Jindal Photo Films Ltd. vs. DCIT,*** *(1998) 234 ITR 170 (Del);* ***CIT vs. Kelvinator of India Ltd.,*** *(2002) 256 ITR 1 (FB)(Del);* ***CIT vs. Eicher Ltd.,*** *(2007) 294 ITR 310 (Del);* ***CIT vs. Kelvinator India Ltd.*** *(2010) 320 ITR 561 (SC)*, wherein the Full Bench decision of the Delhi High Court was affirmed, ***D.T. & T.D.C. Ltd. Vs. ACIT,*** *(2010) 324 ITR 234 (Del);* ***Rose Serviced Apartment Pvt. Ltd. & Anr. vs. Deputy Commissioner of Income Tax,*** *2011 TIOL 347 HC DEL IT;*

Ritu Investment Pvt. Ltd. vs. Deputy Commissioner of Income T..., W.P.(C) 7515/2010*; **Cartini India Ltd. vs. Addl. CIT,** (2009) 314 ITR 275(Bom)*; ***Asteriod Trading and Investments (P) Ltd. vs. DCIT,*** *(2009) 308 ITR 190 (Bom)* and ***CIT vs. Chakiat Agencies (P) Ltd.,*** *(2009)314 ITR 200 (Mad).*

8. We have examined the original records of the case which have been produced before us. Reassessment proceedings have been initiated after examining and considering the audit note. The note records that the auditor's scrutiny revealed that the Assessing Officer had asked the assessee to furnish complete details/confirmations in respect of the sundry creditors amounting to Rs. 1,66,37,402/-. Out of the said amount, the assessee could submit confirmations in respect of the creditors amounting to Rs.1,13,53,344/- and the balance amount of Rs.52,84,058/- remained unconfirmed. The Assessing Officer in the original assessment order has held that the provisions of Section 41(1) were attracted as liability had remained unpaid and the assessee had failed to explain nexus of these expenses with its business activities. But unconfirmed creditors amounting to Rs. 19,86,551/- only were added back, in spite of total unconfirmed creditors of Rs.52,84,058/-. This had resulted in under assessment of Rs.32,97,057/-.

9. In this regard, we may notice the questionnaire/notice dated 1 September, 2005, which was issued by the Assessing Officer at the time of original assessment proceedings. The petitioner was asked to submit list of sundry creditors with their names and addresses, opening and closing balance amount wise. Thereafter, by another notice dated 14th October, 2005, the petitioner was asked to furnish names and addresses of the sundry creditors of Rs.1.66 crores explaining each creditor and give details since when the amount was outstanding. What is available on record and what was submitted by the assessee-petitioner as per the reassessment notice, were details or confirmations to the extent of Rs.1,13,53,344/-. No other details and particulars were available. This was noticed in the audit objection/note. Inspite of this, an addition of Rs.19,86,551/- was made in the original assessment order under Section 41(1) of the Act, but there is no explanation why no addition was made in respect of Rs.32,97,507/-.

10. We have reproduced above the reasons recorded before issue of reassessment notice. We will like to reproduce, excerpts from a note that were prepared and recorded by the authorities before the reasons were recorded. The note records:-

> "The assessee was asked to furnish complete details/confirmations with respect to sundry creditors amounting to Rs.166.37 lakh. Out of the above amount, the assessee could submit

> confirmation only in respect of creditors amounting to Rs.113.53 lakh and balance amount of Rs.52.84 lakh remained unconfirmed. The assessing officer held that provisions of section 41(1) were attracted as the above liabilities remained unpaid and ceased to exist. However unconfirmed creditors of Rs.19.87 lakh only were added back instead of total unconfirmed creditors of Rs.52.84 lakh. The omission resulted in underassessment of income of Rs.32.98 lakh involving short levy of tax of Rs.16.63 lakh."

11. The Commissioner of Income Tax on the note commented that the audit report had been accepted and accordingly the case was discussed with the Additional CIT, Circle 10(1), Additional CIT, R-10 and the Commissioner of Income Tax on 27th August, 2009 in the light of a letter written by the Assessing Officer. The Assessing Officer was asked to examine the case for issue of 148 notice. Thereafter, the reasons were recorded on 31st August, 2009 by the Assessing Officer and approved by the Commissioner of Income Tax on 3rd September, 2009. Thus the present case is not of a mechanical issue of notice after an audit note but a case where the audit note was the starting point albeit the assessing officer after due application of mind and after considering and verifying the facts was satisfied that there were reasons to believe that income chargeable tax has escaped assessment.

12. Explanation 2 to Section 147 stipulates circumstances when

income chargeable to tax shall be deemed to have escaped assessmen

It reads:-

> "Explanation 2.—For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely :—
>
> (a) where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax ;
>
> (b) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return ;
>
> (c) where an assessment has been made, but—
>
> (i) income chargeable to tax has been underassessed ; or
>
> (ii) such income has been assessed at too low a rate ; or
>
> (iii) such income has been made the subject of excessive relief under this Act ; or
>
> (iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed."

13. Interpreting and highlighting the significance of the sa explanation in ***Consolidated Photo And Finvest Ltd. Vs. Assistant Commissioner of Income Tax***, *(2006) 281 ITR 394(Del)* it has been held:-

> "9. The above would show that cases falling in clause (c) of Explanation 2 in which income chargeable to tax has been underassessed or assessed at too low a rate or cases in which income has been made the subject of excessive relief under the Act or where excessive loss or depreciation allowance or any other allowance under the Act has been computed, would constitute cases of income escaping assessment. There is considerable authority for the proposition that the jurisdiction of the Assessing Officer to initiate proceedings would depend upon whether he has reasons to believe that any income chargeable to tax has escaped assessment. A long string of decisions rendered by the Supreme Court have emphasized that the belief of the Assessing Officer must be in good faith and must not be a mere pretence. The apex court has further held that there must be a nexus between the material before the Assessing Officer and the belief which he forms regarding the escapement of the assessee's income. A writ court, therefore, is entitled to examine whether the Assessing Officer's belief was in good faith and whether such reasons had a nexus with the action proposed to be taken."

14. The present case is not one of change of opinion as urged by t petitioner. Question of change of opinion arises when an Assessing Officer forms an opinion and decides not to make an addition and holds that the assessee is correct. In the present case the Assessing Officer had asked specific and pointed queries with regard to the sundry creditors of Rs. 1,66,37,402/- asked for confirmations, names, addresses and details of services rendered. An addition of Rs.19,86,551/- was made for failure to furnish confirmation and explain what services were rendered by the creditors. There is no discussion, ground or reason why addition of Rs.32,97,507/- was not made inspite of the failure of the assessee to furnish conformation and details. It will be appropriate in this regard to refer to Explanation 1 to Section 147 of the Act, which reads:-

> "*Explanation 1.*—Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso."

15. Referring to the said explanation in ***Consolidated Photo and Finvest Ltd.*** (supra) it has been held:-

> "8. It is clear from the above that the two critical aspects which need to be addressed in any action under section 147 are whether the

Assessing Officer has "reason to believe" that any income chargeable to tax has escaped assessment and whether the proposed reassessment is within the period of limitation prescribed under the proviso to section 147. Explanation 1 to the said provision makes it clear that production of account books or other evidence from which the Assessing Officer could with due diligence discover material evidence would not necessarily amount to disclosure within the meaning of the proviso that stipulates an extended period of limitation for action in cases where the escapement arises out of the failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment…..

X X X X

14. In Kantamani Venkata Narayana and Sons v. First Addl. ITO [1967] 63 ITR 638, the apex court held that in proceedings under article 226 of the Constitution of India challenging the jurisdiction of the Income-tax Officer to issue a notice for reopening the assessment, the High Court was only concerned with examining whether the conditions which invested the Income-tax Officer with the powers to reopen the assessment existed. It is not, observed the court, within the province of the High Court to record a final decision about the failure to disclose fully and truly all material facts bearing on the assessment and consequent escapement of income from assessment and tax. The court also held that from a mere production of the books of account, it could not be inferred that there had been full disclosure of the material facts necessary for the purposes of assessment. The terms of the Explanation, declared the court, were too plain to permit an argument that the duty of the assessee to

disclose fully and truly all material facts would stand discharged when he produces the books of account or evidence which has a material bearing on the assessment. The court observed (page 644) :

> "It is the duty of the assessee to bring to the notice of the Incometax Officer particular items in the books of account or portions of documents which are relevant. Even if it be assumed that from the books produced, the Income-tax Officer, if he had been circumspect, could have found out the truth, the Income-tax Officer may not on that account be precluded from exercising the power to assess income which had escaped assessment."

15. To the same effect is the decision of the Supreme Court in Malegaon Electricity Co. P. Ltd. v. CIT [1970] 78 ITR 466 where the court observed (page 471) :

> "It is true that if the Income-tax Officer had made some investigation, particularly if he had looked into the previous assessment records, he would have been able to find out what the written down value of the assets sold was and consequently he would have been able to find out the price in excess of their written down value realised by the assessee. It can be said that the Income-tax Officer if he had been diligent could have got all the necessary information from his records. But that is not the same thing as saying that the assessee had placed before the Income-tax Officer truly and fully all material facts necessary for the purpose of

> assessment. The law casts a duty on the assessee to 'disclose fully and truly all material facts necessary for his assessment for that year'."

16. It has been further observed in ***Consolidated Photo and Finvest Ltd.*** (supra) :-

> "19. …The argument that the proposed reopening of assessment was based only upon a change of opinion has not impressed us. The assessment order did not admittedly address itself to the question which the Assessing Officer proposes to examine in the course of reassessment proceedings. The submission of Mr. Vohra that even when the order of assessment did not record any explicit opinion on the aspects now sought to be examined, it must be presumed that those aspects were present to the mind of the Assessing Officer and had been held in favour of the assessee is too far-fetched a proposition to merit acceptance. There may indeed be a presumption that the assessment proceedings have been regularly conducted, but there can be no presumption that even when the order of assessment is silent, all possible angles and aspects of a controversy had been examined and determined by the Assessing Officer…."

17. In ***Indian & Eastern Newspaper Society vs. Commissioner of Income Tax***, *(1979) 119 ITR 996 (SC)*, it was held that the observations in Ka***lyanji Mavji & Co. v. CIT,*** *(1976) 102 ITR 287 (SC)* that reopening would cover a case where income had escaped

assessment due to the "oversight, inadvertence or mistake" was t widely stated and, therefore, did not lay down the correct law. This was stated in the context of reappreciation or reconsideration of the same material. It was clarified and stated as under (at page 1005):-

> "A further submission raised by the revenue on s. 147(b) of the Act may be considered at, this stage. It is urged that the expression " information " in s. 147(b) refers to the realisation by the ITO that he has committed an error when making the original assessment. It is said that, when upon receipt of the audit note the ITO discovers or realizes that a mistake has been committed in the original assessment, the discovery of the mistake would be " information " within the meaning of s. 147(b). The submission appears to us inconsistent with the terms of s. 147(b). Plainly, the statutory provision envisages that the ITO must first have information in his possession, and then in consequence of such information he must have reason to believe that income has escaped assessment. The realisation that income has escaped assessment is covered by the words " reason to believe", and it follows from the " information " received by the ITO. The information is not the realisation, the information gives birth to the realisation."

18. In this case, the Supreme Court had primarily concerned with the expression 'information' as stipulated in Section 147(b) of the Act as it existed and it was held that information of an internal audit party

on a point of law cannot be regarded as information within t meaning of the said Section.

19. It is well settled that audit objection on the point of fact can be a valid ground for reopening of assessment. In the case of ***New Light Trading Co. vs. Commissioner of Income Tax***, *(2002) 256 ITR 391 (Del)*, a Division Bench of this court after referring to the decision of Supreme Court in ***CIT vs. P.V.S. Beedies Pvt. Ltd.*** *(1999) 237 ITR 13 (SC),* has held as under (at page 393) :

> "In the case of P. V. S. Beedies Pvt. Ltd. [1999] 237 ITR 13, the apex court held that the audit party can point out a fact, which has been overlooked by the Income-tax Officer in the assessment. Though there cannot be any interpretation of law by the audit party, it is entitled to point out a factual error or omission in the assessment and reopening of a case on the basis of factual error or omission pointed out by the audit party is permissible under law. As the Tribunal has rightly noticed, this was not a case of the Assessing Officer merely acting at the behest of the audit party or on its report. It has independently examined the materials collected by the audit party in its report and has come to an independent conclusion that there was escapement of income. The answer to the question is, therefore, in the affirmative, in favour of the Revenue and against the assessee."

20. In the light of the above discussion, the contention of the assessee that the present case is of change of opinion has to be rejected. A point of fact, viz. unconfirmed creditors, was brought to notice.

21. The second question which arises for consideration is wheth the assessee had made full and true disclosure of material facts. We have already reproduced above the contention of the assessee in this regard in the objections. We have also referred to the two letters written by the Assessing Officer asking for details of sundry creditors being letters dated 14th September, 2005 and 14th October, 2005. The petitioner was called upon and asked to furnish names and addresses of the sundry creditors and since when the amount was outstanding. The petitioner was also asked to explain details of each creditor. There is nothing on record and it is not even the stand of the petitioner that those details in respect of all parties were furnished. If there is no disclosure and details were not furnished, there cannot be full and true disclosure. In W.P.(C) No. 9036/2007, ***Honda Siel Power Products Ltd. vs. The Deputy Commissioner of Income Tax and Anr.,*** decision dated 14th February, 2011, we had held:

> "10. ......The term "failure" on the part of the assessee is not restricted only to the income-tax return and the columns of the income-tax return or the tax audit report. This is the first stage. The said expression "failure to fully and truly disclose material facts" also relate to the stage of the assessment proceedings, the second stage. There can be omission and failure on the part of the assessee to disclose fully and truly material facts during the course of the assessment proceedings. This can happen when the assessee does not disclose or furnish to the

> Assessing Officer complete and correct information and details it is required and under an obligation to disclose. Burden is on the assessee to make full and true disclosure."

In such circumstances, it cannot be held that there was full and true disclosure by the petitioner-assessee. The second contention of the petitioner fails.

22. In view of the aforesaid, we do not find any merit in the present writ petition and the same is accordingly dismissed. It is clarified that the observations made in this order are for the purpose of deciding the present lis regarding validity of the reassessment notice and the said observations/findings will not be construed as binding on the Assessing Officer/appellate authorities in the Income Tax proceedings. There will be no order as to costs.

(SANJIV KHANNA)
JUDGE

(DIPAK MISRA)
CHIEF JUSTICE

SEPTEMBER 26th, 2011
NA